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Missouri and Kansas Bricklayers Local Union No. 15, of the International Union of Bricklayers and Allied Craft Workers, AFL-CIO and Jacor Contracting, Inc. and D. H. Restoration, Inc. and Cement Masons Local 518 of the Operative Plasterers' and Cement Masons' International Association, AFL-CIO. Cases 17-CD-367, 17-CD-368, and 17-CD-369

September 24, 2003

**DECISION AND ORDER QUASHING NOTICE
OF HEARING**

BY CHAIRMAN BATTISTA AND MEMBERS SCHAMBER
AND WALSH

This is a consolidated¹ proceeding under Section 10(k) of the National Labor Relations Act, following the filing of charges in Case 17-CD-367 on May 1, 2003,² by Jacor Contracting, Inc. (Jacor or the Employer) and in Cases 17-CD-368 and 17-CD-369 on May 5 and May 14 by D. H. Restoration, Inc. (D. H. Restoration or the Employer). It is alleged that Missouri and Kansas Bricklayers Local Union No. 15 of the International Union of Bricklayers and Allied Craft Workers, AFL-CIO (BAC Local 15) violated Section 8(b)(4)(D) of the Act by engaging in certain proscribed activity with an object of forcing the Employers to assign certain work to employees represented by BAC Local 15 rather than to employees represented by Cement Masons Local Union 518 of the Operative Plasterers' and Cement Masons' International Association, AFL-CIO (Plasterers or Local 518). A hearing was held on June 4 and 6, 2003, before Hearing Officer Susan A. Wade-Wilhoit. Thereafter, BAC Local 15, Jacor, and D. H. Restoration filed briefs in support of their positions. BAC Local 15 also filed a motion to quash the Section 10(k) notice of hearing.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board affirms the hearing officer's rulings, finding them free from prejudicial error. On the entire record, the Board makes the following findings.

I. JURISDICTION

The parties stipulated that Jacor, a Missouri corporation, is engaged in the business of restoration and waterproofing for commercial and industrial entities, and that,

during the past calendar year, Jacor has sold and shipped goods and services valued in excess of \$50,000 from its facility in Kansas City, Missouri, to customers located outside the State of Missouri. In addition, the parties stipulated that, during the same period, Jacor has received goods and services valued in excess of \$50,000 from suppliers located outside the State of Missouri. The parties also stipulated that D. H. Restoration, a Missouri corporation, is engaged in the business of contract caulking, restoration, and waterproofing for commercial and industrial entities and that, during the past calendar year, it has sold and shipped goods and services valued in excess of \$50,000 from its facility in Pleasant Hill, Missouri, to customers located outside the State of Missouri. Accordingly, on the basis of the parties' stipulations, we find that Jacor and D. H. Restoration are engaged in commerce within the meaning of Section 2(6) and (7) of the Act. The parties also stipulated, and we find, that BAC Local 15 and Plasterers Local 518 are labor organizations within the meaning of Section 2(5) of the Act.

II. THE DISPUTES

A. Background and Facts

Jacor is a masonry and concrete contractor. Its principal business is centered on the preservation, maintenance restoration, and waterproofing of masonry and concrete materials and includes the caulking of all related materials. Jacor has been in business since 1993, and its president is Ted Jacques. In August 1996, Jacor established a Section 8(f) relationship with Local 518. Jacor became a party to the multiemployer collective-bargaining agreement negotiated between the Builders Association of Missouri (Builders Association) and Local 518. In August 1997, Jacor entered into an 8(f) relationship with BAC Local 15. Jacor executed a designation of exclusive bargaining representative form that assigned Jacor's bargaining rights to the Builders Association. From August 1997 through March 2003, Jacor was signatory to contracts with both Unions and employed workers represented by both. The assignment of work was made at the discretion of Jacor's president without regard to which Union represented the employees. The assignment of work in this fashion went unchallenged by both Unions during this period.

In early 2003, Jacor decided to withdraw its assignment of bargaining rights from the Builders Association and terminate its signatory status with BAC Local 15. Jacor advised its employees who were represented by BAC Local 15 of its decision and told them they could remain Jacor employees and be represented by Local 518. All of Jacor's BAC Local 15-represented employees except one became Local 518-represented employ-

¹ An order consolidating cases and notice of hearing was issued on May 28, 2003.

² All dates refer to 2003 unless otherwise indicated.

ees.³ Jacor's contract with BAC Local 15 terminated on March 31, 2003. Local 518 became the recognized representative of Jacor's employees.

In early April, BAC Local 15 Representative Steven McClanahan and two other BAC representatives followed a Jacor employee, James Baglin, as Baglin was driving his van to a jobsite. Baglin testified that McClanahan said that all caulking work belonged to BAC Local 15 and that the only way that Baglin could continue to perform the work was if Jacor signed a collective-bargaining contract with BAC Local 15.

At about the same time, McClanahan and another BAC representative visited Jacques at Jacor's office. Jacques testified that McClanahan told Jacques that BAC Local 15 claimed the work being performed by the Local 518-represented employees and that McClanahan said that "things were going to get ugly" if BAC Local 15 were not assigned the work.

The factual background concerning D. H. Restoration is similar. From 1993 until March 31, 2003, D. H. Restoration had an 8(f) relationship with BAC Local 15. All of D. H. Restoration's hourly field workers were represented by BAC Local 15. In January 2003, D. H. Restoration gave notice of its intent to terminate this relationship upon the contract's expiration of March 31, 2003. Effective April 1, 2003, D. H. Restoration signed an 8(f) agreement with Local 518. All of its workers except one became Local 518-represented employees.⁴

The general counsel for the Builders Association held meetings on April 17 and 21. Representatives from the two Unions, the Builders Association, and J. E. Dunn, the largest general contractor in the area, attended. The general counsel testified that he realized that certain companies had not signed contracts with BAC Local 15 and had signed with Local 518, and that he was concerned that some jurisdictional issues could arise. At the first meeting, BAC Local 15 President Steve Mullen told the parties that the work belonged to the Bricklayers and that he would picket Jacor and D. H. Restoration jobsites to protect that work. No agreement was reached at the meeting. Although some of the participants thought that a tentative agreement was reached at the second meeting, no formal resolution was ever entered into.

The parties stipulated that for limited periods between April 24 and May 8, BAC Local 15 engaged in picketing at various sites in the Kansas City area where Jacor and D. H. Restoration had jobs. The parties also stipulated that the language used on the picket signs was:

Notice to the Public (Jacor or D. H. Restoration) does not have a contract with BAC Local 15, and is breaking down standards and wages for working conditions in the area.

B. Work in Dispute

The work in dispute involves the caulking, waterproofing, sealing, and restoration of construction services at the following jobs: (1) Sysco Foods, Olathe, Kansas; (2) St. Joseph Parish-K-8, Shawnee, Kansas; (3) Intervet, Desoto, Kansas; (4) The Jones Store, Independence Center, Independence, Missouri; (5) Vine Street Lofts, Kansas City, Missouri; (6) Nebraska Furniture Mart, Kansas City, Kansas; (7) Cerner Development, North Kansas City, Missouri; (8) Lee's Summit West High School, Lee's Summit, Missouri; and (9) Ash Grove World Headquarters.

C. Contentions of the Parties

BAC Local 15 moves to quash the notice of hearing, arguing that it has a representational dispute with each of these Employers concerning which labor organization should be representing the employees who were formerly represented by BAC Local 15 and who continue to be assigned to perform the work. It emphasizes that it never suggested or demanded that these contractors change any work assignments. BAC Local 15 contends that the key element for finding an 8(b)(4)(D) violation: "an attempt to take a work assignment away from another group, or to obtain the assignment rather than have it given to the other group" is missing.

In the event that the Board finds that there is reasonable cause to believe that a violation of Section 8(b)(4)(D) has occurred, BAC Local 15 contends that the Board should award the work, with the exception of caulking and/or waterproofing of concrete "flat" work," to bricklayers on the basis of employer past practice and area practice.

The Employers and Local 518 contend that a bona fide jurisdictional dispute is properly before the Board because BAC Local 15 has not made a demand for recognition and has not demanded that the Employers execute a new agreement with BAC Local 15. Instead, they argue, BAC Local 15 has claimed the work for its members. Jacor contends that the Board should award the work to employees represented by Local 518 on the basis of its collective-bargaining contract with Local 518, industry and area practice, employer past practice, and employer preference. D. H. Restoration argues that the work should be awarded to employees represented by Local 518 on the basis of employer preference and assignment, efficiency and economy of operations, collective-

³ That one employee left Jacor's employ.

⁴ That one employee left D. H. Restoration's employ.

bargaining contracts, and experience and expertise in the work. Both Employers request a broad award with respect to the work in dispute throughout the Kansas City area. Jacor additionally asks that the award apply to other geographic areas where it performs the work in question.

D. Applicability of the Statute

Before the Board may proceed with a determination of a dispute pursuant to Section 10(k) of the Act, it must be satisfied that: (1) there are competing claims for the work; (2) there is reasonable cause to believe that Section 8(b)(4)(D) has been violated; and (3) the parties have not agreed on a method for the voluntary adjustment of the dispute.⁵

On the record before us, we are not satisfied that there are rival groups competing for the work. Although the Employers have framed the issues in terms of a jurisdictional dispute, it is clear that the dispute is not over the assignment of the work to one group of employees instead of a different group, within the meaning of Section 8(b)(4)(D). Rather, the dispute “involves the question of which union will represent the employees who are currently performing the . . . work.”⁶ None of the parties has objected to the performance of the work by the Employers’ current employees. On the contrary, the Employers would like to retain their current employees but prefer that Local 518 represent them. The Employers, BAC Local 15, and Local 518 are in dispute only over which union should represent the employees currently performing the work at the various jobsites.

The situation here is analogous to the one in *Carpenters Local 275 (Lymo Construction)*, 334 NLRB 422 (2001). In that case, the employer assigned metal siding work to a composite crew of employees, some of whom were represented by the Sheet Metal Workers and some by the Carpenters. The employer’s core employees gradually transitioned their membership from the Sheet Metal Workers to the Carpenters. The employer contended that the Sheet Metal Workers’ filing of a grievance and the Carpenters’ threat to strike if the employer changed the assignment constituted violations of Section 8(b)(4)(D) and required the Board to enter a 10(k) award. The Sheet Metal Workers argued that “for there to be a jurisdictional dispute there must be a dispute between two groups of employees over which group should perform the challenged work.” It contended that there was

only one core group of employees who performed the disputed work and that the Carpenters had replaced the Sheet Metal Workers in representing those core employees. The Board agreed with the Sheet Metal Workers, finding that “the dispute is over which union will represent the single group of employees currently performing that work.”⁷ Similarly, the dispute in the instant case is over which union will represent the single group of Jacor or D. H. Restoration employees currently performing the work.⁸

It is well established that a dispute within the meaning of Section 8(b)(4)(D) requires a choice between two competing groups.⁹ In this regard, the Board has stated:

There must, in short, be either an attempt to take a work assignment away from another group, or to obtain the assignment rather than have it given to the other group.¹⁰

Thus, in light of the foregoing, we conclude that the dispute here does not concern the assignment of work to one group of employees rather than another within the meaning of Section 8(b)(4)(D). Accordingly, as this matter is not a jurisdictional dispute within the meaning of Section 10(k), we shall quash the notice of hearing.

⁷ *Lymo Construction Co.*, supra at 423.

⁵ *Teamsters Local 259 (Globe Newspaper Co.)*, 327 NLRB 619, 622 (1999); *Laborers Local 113 (Super Excavators)*, 327 NLRB 113, 114 (1998); *Laborers’ District Council of West Virginia (Michel, Inc.)*, 325 NLRB 1058, 1059 (1998).

⁶ *Carpenters Local 1307 (Dearborn Village)*, 331 NLRB 245, 246 (2000).

⁸ Compare *Bricklayers Local 5 (Jersey Panel)*, 337 NLRB No. 28 (2001). In that case, the employer’s core employees had been represented by Bricklayers Local 5. After the core employees signed authorization cards to be represented by the Plasterers, the employer entered into a collective-bargaining contract with the Plasterers. The vice president of Bricklayers Local 5 stated that if Bricklayers Local 5 could not get the core employees back as members, then he wanted “it all.” The Board did find that these comments reflected “a primary representational objective.” However, the Board continued, “they go further and also reveal a jurisdictional object, should the representational goal fail.” Namely, the Board stated, these comments can reasonably be interpreted to mean that Bricklayers Local 5 wanted the employer to use Bricklayers Local 5 members rather than its core employees. In the instant case, there is no evidence that BAC Local 15 wanted the Employers to use any employees other than the ones they were using, and thus no jurisdictional objective is presented.

⁹ *Laborers Local 1 (DEL Construction Co.)*, 285 NLRB 593, 595 (1987), citing *Food & Commercial Workers Local 1222 (FedMart Stores)*, 262 NLRB 817, 819 (1982), and *Teamsters Local 222 (Jelco, Inc.)*, 206 NLRB 809, 810–811 (1973).

¹⁰ *FedMart Stores*, supra at 819, citing *Communications Workers (Mountain States Telephone)*, 118 NLRB 1104, 1107 (1957).

ORDER

It is ordered that the notice of hearing issued in this case is quashed.

Dated, Washington, D.C., September 24, 2003

Peter C. Schaumber, Member

Dennis P. Walsh, Member

Robert J. Battista, Chairman

(SEAL)

NATIONAL LABOR RELATIONS BOARD